STATE OF MINNESOTA

Supreme Court.

GEORGE W. GILBERT and
HENRY ASH,
Appellants,

vs.

GEORGE THOMSON,
Respondent.

Points and Authorities of Respondent.

MITCHELL & TALE,
Attorneys for Respondent.

H. H. SIVER PRINTING COMPANY, ST. PAUL.

STATE OF MINNESOTA,

SUPREME COURT.

GEORGE W. GILBERT and HENRY ASH,
Appellants,

against

GEORGE THOMPSON,
Respondent.

POINTS AND AUTHORITIES FOR RESPONDENT.

This was an action brought by appellants to recover possession from respondent of eighty acres of land in Wabasha County.

The respondent denied their title and claimed title in himself.

The jury under direction of the court found a verdict for respondent. The appellants waiving their right to a second trial under the statute, make a motion for a new trial upon a case made.

The motion was denied. From this order they appeal.

The facts of the case are as follows:

Both parties claim title under Amelia Monette (formerly Amelia McNair), the original grantee of the United States, and a half-breed of the Dakota or Sioux

nation of Indians. The appellants claim under a deed from said Amelia McNair, or Monette, dated May 29, 1867. Having produced this deed in evidence, they rested their case.

The respondent, to prove his title, produced in evidence—

First—A power of attorney from said Amelia McNair to one Benjamin Lawrence, dated May 27, 1857, and recorded July 6, 1857. (See Schedule B.)

Second—A deed from Amelia McNair by said Lawrence, her attorney, to one F. S. Richards, dated July 18, 1857.

Third—A deed from said Richards to one Rodman Burchard, dated July 18, 1859.

Fourth—An admission by plaintiffs that the defendant is in possession of the land in question, under a contract of purchase from Rodman Burchard (folio 4).

The defendant having thus made out a perfect record title, rested.

The appellants then proposed to avoid the record title of respondent by offering to show that the said Amelia McNair sold to one A. P. Foster certain scrip issued to her under the act of congress, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dakota or Sioux nation of Indians, and for other purposes," passed July 17, 1854. That a part of said scrip was afterwards located by said Foster upon the land in question.

That the power of attorney to Lawrence was executed and delivered to Foster for the purpose of evading the said act of congress, and therefore void, and that therefore no title ever passed to respondent's grantees.

Although various offers were made, yet all may be summed up in an offer to prove that the power of attorney was executed with the intention of evading the act of congress, which declares all transfers of scrip void.

This evidence the court excluded. To which ruling appellants excepted.

Although other minor points are made, yet the above is the main, if not the only point in the case.

Did the court err in excluding this testimony? Could the title of respondent be attacked and voided in the manner proposed?

It is a question of importance not only because of its bearing on this particular case, but also because its decision is practically decisive of the title by which the inhabitants of a large part of at least two populous counties of the state hold their homes and their firesides.

It is a matter of public notoriety that a class of unprincipled and unscrupulous sharks and speculators have procured for a nominal consideration, from ignorant and degraded "half-breeds," deeds of conveyance covering a great part of the best and most highly cultivated portions of Wabasha and Goodhue counties, and are now only awaiting some encouragement from our courts to institute a flood of ejectment suits that will bring ruin and disaster to many an innocent home.

And while we understand the rules of professional propriety too well to attempt to appeal to any supposed prejudice, yet we apprehend that we are not violating any rule of propriety in thus referring to the interests at stake in the decision of this case, and asking the most careful consideration on part of the court to the issues involved. For while mere sympathy will not and

ought not to control or even influence the decision of any court, yet considerations of public policy always have and ever ought to have their appropriate influence in the decision of cases of this character.

It is only when shut up by the most inexorable and unbending rules of law, that a court would feel bound to render a decision that would practically result in a great public wrong, and open wide the flood gates of injustice and oppression. But fortunately, we are not driven to any such strait. In this case the highest justice, and the clearest and plainest principles of law fully harmonize. The court below was clearly right in excluding the evidence in question.

The provision of law upon which appellants wholly rely is that contained in the act of July 17, 1854, which after providing for the issuing of scrip to the Sioux half-breeds, enacts that "no transfer or conveyance of any of said certificates or scrip shall be valid." (U. S. Statutes, Vol. 10, page 304.)

There is no limitation or restriction whatever, imposed upon the alienation of the land entered with such scrip. There is not even anything forbidding a contract for the sale of such land before it is entered. See same act. Had it been the intention of Congress to impose any such restriction, it would have been so expressed in the act itself, as in the case of the "Preemption Act" of 1841, or the act of July 5th, 1838. U. S. S. Vol. 5, page 260, sec. 29, and act of August 4th, 1842, U. S. S. Vol. 5, page 503.

All such acts imposing any restrictions upon the alienation of property are to be construed strictly and not extended beyond the express and apparent intention of the act itself. It is inconsistent with the nature

of property to restrict the right of alienation on the part of the owner.

Although the question as to whether the title to a portion of the public lands has passed from the United States, must depend exclusively upon the laws of the United States, and although Congress has the full power to dictate how and in what manner the title shall pass from the United States, yet when the title has once passed, the land becomes subject to state laws and by them alone must the mode and manner of alienation be controlled.

Wilcox vs. Jackson, 13th Peters 498;
Carroll vs. Safford, 3d How U. S. 441;
Camp vs. Smith, 2d Minn. 155.

The fair construction of the object and effect of this provision of the act of July 14th, 1854, is simply to provide how the title to the land entered shall be obtained from the United States. It simply provides that the scrip must be entered in the name of the half-breed, and that no assignment of the scrip will be recognized by the United States land offices, but leaving the whole question of title to the land, or the mode of alienating it, to be governed by the laws of the state where it is situated.

Camp vs. Smith, 2d Minn. 155.

With these rules to aid us in the proper interpretation of the statute in question, we now turn to the position taken by appellants.

Because the act of Congress declares that no transfer of scrip shall be valid, they assume that the whole transaction between Foster and Amelia McNair and the power of attorney to Lawrence are wholly void. They assume to repudiate the whole transaction as illegal and

void, and yet they, in the very next breath, ratify and recognize part of the transaction by claiming as theirs the land which Foster purchased with this scrip.

In other words they repudiate the whole transaction for the purpose of defeating our title, and then recognize and ratify a part of the same transaction for the purpose of making out title in themselves.

In order to defeat our title they are compelled to assume that every act in any way connected with the transaction is void. This includes the location of the scrip, the power of attorney and the conveyance by Lawrence, as well as the sale and transfer of the scrip. And yet the only claim of title which they make depends upon and recognizes the validity of some of these very acts. They cannot thus repudiate certain parts and ratify other parts, if all these acts are to be considered one indivisible transaction. In such a case the whole must stand a fall together. But if, on the other hand, these acts are to be held separate and severable. so as to avoid the sale of the scrip, but yet sustain the location and entry of the land by Foster, this theory would in like manner sustain the validity of the power of attorney and the deed made under it by Lawrence.

Again the theory of the appellants is that no legal sale or transfer of the scrip was ever made. *That the scrip is to this day as much the property of Amelia McNair as it ever was.* That Foster or his assignees never acquired any right whatever to it. And yet in claiming title to this land, they not only admit, but necessarily assume that they no longer own the scrip, but have acquired some land in place of it.

So absurd are the conclusions to which the illogical premises of the appellants necessarily lead them. At every step in the case they take one position in order

to defeat our title, and then assume a directly opposite one to establish their own.

Suppose Amelia McNair did sell the scrip to Foster. Such an act was no doubt invalid.

Suppose she has a remedy. It must rest necessarily, on the assumption that the attempted sale being invalid, the title to the scrip is still in her and her property. And therefore her remedy (if any) would be to take steps to recover, *not certain real estate, but the specific scrip.*

And we undertake to say that such an action is the only one that either Amelia McNair or heirs can ever maintain by any process of reasoning bearing even the semblance of consistency.

For these reasons, if no others existed, the evidence offered was clearly incompetent and irrelevant, and properly excluded by the court below.

But again, if the transaction between Foster and the half-breed was illegal, as being against statute, the parties were in *"pari delicto."* It was as unlawful for her to sell as for him to buy. And the contract was fully executed. In such a case the parties being in *"pari delicto"* and the contract being *executed,* the law will not interfere, but leave them as it finds them. Nor will the court in such a case allow the party to recover by taking advantage of his own wrong. *"Ex turpi causa non oritur actio."* And this applies to privies as well as to the original parties.

And for this reason, also, the court properly excluded the evidence.

2d Parsons on Contracts, pages 746 and 747;

2d Parsons on Contracts, page 782;

Foote & Stone vs. Emerson, 10th Vt. 338;

Fackler vs. Ford, 24th How. U. S. 322;
Fivaz vs. Nichols, 52d E. C. L. 501;
Phalen vs. Clark, 19th Conn. 420.

In this case there is *no allegation nor offer to prove that the respondent was either a party to the alleged illegal and void contract, nor that he had any notice or knowledge whatever thereof.* He stands in this case, as in fact, an innocent purchaser for valuable consideration. In such a case Amelia McNair as well as her grantees cannot set up or prove such alleged illegal or void contract as against an innocent purchaser.

Fennell vs. Ridler, 5th B. & C. 406;
Bloxome vs. Williams, 3d B. & C. 232.

Again Amelia McNair having stood by for over ten years and suffered respondent to purchase the land, improve it and expend money on it, acquiescing in the sale made for her and in her name by Lawrence, must now be presumed to have ratified the acts of h[illegible]ttorney, and is now estopped from asserting title to the prejudice of an innocent purchaser.

Wendall vs. Van Ransalaer, 1st John Ch. 344;
Stoirs vs. Barker, 6th John Ch. 166;
Higinbotham vs. Bennett, 5th John Ch. 184;
Town vs. Needham, 3d, Paige 546.

This estoppel applies to privies in estate in blood and in law. Authorities Passim.

Finally, even if all that appellants offered to prove were true and admitted, it could not and would not in any way affect or avoid the power of attorney to Lawrence, or the deed executed under it. It would prove an illegal act in the sale of the scrip, we admit.

But the power of attorney to sell land and the deed made by virtue of it, however they may have been connected in the minds of the party with the sale of the scrip, were in fact independent acts wholly disconnected with the sale of the scrip, and in the eye of the law unconnected with the illegal act and founded upon a distinct and collateral consideration, and therefore not affected by any unlawful acts of the parties in buying or selling the scrip. The consideration in case of the sale of the scrip would move from Foster to Amelia McNair. In the sale of the land the consideration moved from the purchaser to Amelia McNair, through her attorney, Lawrence. The alleged illegal contract of sale of scrip was between Foster and McNair. The contract of purchase and sale of the land was between McNair, through her attorney, and F. S. Richards. *A different contract between different parties, made at a different time, and for a different consideration.* Suppose that under this power of attorney, Lawrence had bargained and sold some other real estate belonging to said McNair, wholly disconnected with this scrip transaction. Would it be claimed that such conveyance would be void? Most certainly not.

This shows that the power and the deed have a force and effect wholly independent of the legality or illegality of the scrip sale and that it is founded upon a distinct consideration. The respondent in making out his title, requires and asks no aid from the invalid sale of scrip. He relies solely on the power of attorney and acts done under it; deeds which are in contravention of no law written or unwritten.

We therefore submit that none of the offers of the appellant go to the validity of the power of attorney,

and therefore the evidence offered was irrelevant and immaterial.

Phalen vs. Clark, 19th Conn. 431;
Story on Contracts, secs. 621 and 622.

So much for this part of the case. We submit that any one of the positions we have taken above is sufficient to exclude the evidence offered.

The counsel refers to a case said to be decided in the U. S. Circuit Court at St. Paul. (Cronin et al vs. Dugan and wife.) This case not being reported, we know nothing about it, except from hearsay. We understand, however, that in the case referred to, the instrument *upon which the party relied for title and which he offered in evidence,* showed upon its face that it was a sale of scrip. The difference between such a case and the one at bar is too evident to require a statement. Moreover, we also understand that it was a ruling made by Judge Miller, on the trial of the case at circuit, upon objection raised by the counsel to the admissibility of the evidence, and hence was made without examination or reflection except such as could be given at the moment. Such a ruling at Nisi Prius ought hardly to be considered authority in any court. Nor do we understand that either court or counsel considered it as either final or decisive of the point.

The only other points in the case are the exceptions taken by appellants to the admissibility of the deed from Amelia McNair to F. S. Richards, none of which are, in our opinion, worthy of any extended answer. The first exception is that the description is void for uncertainty, because it uses certain abbreviations. We are confident that the supposed objection here taken by counsel, is founded upon an error in the printed

case. No such point was made in the court below, and we are confident that the record will not be found to contain the abbreviated description to which counsel excepts.

But we submit that the description as contained in the printed case is good. These abbreviations have a fixed and well defined meaning attached to them. They are abbreviations in common use in the United States land offices, in certificates of entry and other evidences of title to land.

The second objection taken, is to the form of the certificate of acknowledgment. This certificate, we submit, is not only sufficient, but also in approved form. This however is immaterial.

It is not essential to the validity of the deed that it be acknowledged at all. The deed is executed in proper form, and this is all that is necessary to its validity.

Myrick vs. Millan, 13 Wis. 198.

The judgment of the court below ought therefore to be affirmed.

July 23, 1869.

MITCHELL & YALE,
Attorneys for Respondent.